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Motions

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ONEWEST BANK, FSB,

4 Plaintiff,

5 v.

10 Civ. 4855 SHS

6 HSBC BANK USA NATIONAL ASSOCIATION,
7 AS TRUSTEE OF THE DEUTSCHE ALT-A
8 SECURITIES MORTGAGE LOAN TRUST,
9 SERIES 2006-AR5,

Defendant.

-----x

10 November 3, 2011
11 2:30 p.m.

12
13 Before:

14 HON. SIDNEY H. STEIN,

15 District Judge

16
17 APPEARANCES

18
19 O'MELVENY & MYERS, LLP
20 Attorneys for plaintiff
21 BY: ANDREW J. FRACKMAN, Esq.
KENNETH MURATA, Esq.
Of counsel

22 MAYER BROWN, LLP
23 Attorneys for defendant
24 BY: MICHAEL O. WARE, Esq.
JENNIFER M. ROSA, Esq.
Of counsel

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1 (In open court)

2 (Case called)

3 THE COURT: Good afternoon. Please be seated. For
4 disclosures, I know Mr. Frackman. From where? From Paul
5 Weiss?

6 MR. FRACKMAN: From Paul Weiss.

7 THE COURT: Our Paul Weiss days.

8 MR. WARE: Mr. Frackman mentioned that to me
9 yesterday, and the defendant has no questions or concerns.

10 THE COURT: All right. I have questions and concerns
11 about this case, though, so let me ask them. I am not certain
12 that this is an appropriate action for declaratory judgment as
13 opposed to just giving some succor to HSBC Bank. I am not
14 quite sure why you think it is a live enough controversy for I
15 think it is 2201. Somebody should tell me about that, that is
16 one thing.

17 MR. FRACKMAN: Your Honor, an Andrew Frackman.

18 THE COURT: I am sorry. Let me do a couple of
19 questions.

20 MR. FRACKMAN: Sure.

21 THE COURT: Yes, 2201, in a case of actual controversy
22 within its jurisdiction. I am not sure what the actual
23 controversy is. That is one point.

24 The second thing is the system breaks down in a way
25 when the adversary system isn't engaged, and we had OneWest

1 Bank seeking a declaratory judgment and HSBC Bank as the
2 trustee saying it doesn't oppose. So there is nobody opposing
3 the request. I want to make sure that all of the stakeholders
4 here have been heard from so that I understand their positions.

5 To the extent I can understand that, certainly the
6 homeowners -- the mortgage holders -- sorry -- not the ones who
7 hold the mortgage, but homeowners themselves, the ones who have
8 taken out the loans from the banks secured by the mortgages
9 would be seeking modifications, so they would be interested in
10 the declaratory judgment being issued.

11 OneWest Bank is the movant here. HSBC says it doesn't
12 oppose it. It's surveyed the certificate holders in all but
13 two trusts. 25 percent or more, which I think is the operative
14 number of the operative percentage, have said that
15 modifications can be made, as I understand it.

16 So my question is: Are those all the people with an
17 interest in this motion?

18 So let's start with those two questions, Mr. Frackman.

19 MR. FRACKMAN: Yes, your Honor.

20 First, when I first got involved in this last week,
21 because I was uninvolved in the early stages of this matter, I
22 took a look at the papers and I recognized that the filing was
23 not done in the most user-friendly way for the court and
24 undoubtedly for the clerks.

25 If we're going to talk about the underlying documents

1 that are referenced in the papers, what I did was I took one
2 set of them and I prepared a notebook that actually has
3 numbered pages with the relevant language highlighted. So it
4 might be helpful to --

5 THE COURT: You can pass it up. I, in effect, have
6 done that already.

7 MR. FRACKMAN: I suspect you may have done it already,
8 and I frankly apologize for not having done it.

9 THE COURT: Stickies are very useful.

10 MR. FRACKMAN: This is just one of the -- just so you
11 all know, this binder contains one of the series of
12 securitizations involved here, the PSA, the AARA and
13 supplemental prospectus relating to that series all in one
14 place. We highlighted the language. Maybe we won't need it,
15 but I wanted to hand it up first.

16 So the issue, as the court probably has figured out,
17 is that there are proceedings in state court where --

18 THE COURT: Is that Suffolk County proceeding that is
19 the only referenced still a live proceeding?

20 MR. FRACKMAN: I believe there were two in Suffolk
21 County and I don't know if there are others as well, frankly.
22 I know what happened in those is that there was a foreclosure
23 proceeding. The homeowner wanted OneWest to modify the
24 mortgage. We explained to the court that we could not by
25 ourselves modify it without the consent of HSBC. They didn't

1 really believe us. That put us in a very difficult situation,
2 and just to give you a sense of the scope here, there are
3 approximately 780 of the approximately 2800 mortgages included
4 in these securitized pools that have applied for modification.

5 In our experience, about 50 percent of those applying
6 complete the documentation and are, therefore, eligible for
7 modification.

8 THE COURT: This is under HAMP?

9 MR. FRACKMAN: Yes, talking about 400 homeowners.

10 THE COURT: They want modifications under HAMP.

11 You say you can't modify because primarily of the
12 MMLPSA, and so you want HSBC to help you out, and HSBC says we
13 are not going to help you out here unless you agree to
14 indemnify us, and there is a standoff between two banks that
15 are not movable objects in this regard because everybody wants
16 complete safety.

17 Why is that an actual controversy sufficient to give
18 me what's discretionary jurisdiction, I think discretionary. I
19 don't have to accept any declaratory judgment action. I need
20 to understand its real controversy. What happened in those two
21 Suffolk County cases?

22 MR. FRACKMAN: What happened was we couldn't modify
23 the mortgages. The one thing that is clear here, and it
24 relates to your question, I think it is implicit in your
25 question, everyone would like to be able to modify.

1 THE COURT: You took the position you couldn't modify
2 the mortgages, but you're asking me to take the position that
3 you can modify the mortgages, and that's really all you're
4 doing. You are saying, "Court, you should decide the issues so
5 that I don't have to take a position."

6 MR. FRACKMAN: So we don't face liability from HSBC or
7 others with respect to that.

8 THE COURT: Is that sufficient?

9 MR. FRACKMAN: We believe it is, and HSBC can talk to
10 this as well. We need HSBC to agree. They don't agree. We
11 are at risk otherwise. There is a tension between some of the
12 documents.

13 THE COURT: There is, there is. I am just not quite
14 sure why, why you need me to give you an insurance policy.
15 That is true of HSBC. Mr. Frackman is looking to HSBC for
16 help. Were it not to help, he is fobbing it off on you since
17 you fobbed it off on OneWest by saying give us indemnification.
18 Where is the controversy under 2201?

19 MR. WARE: The controversy, your Honor, and Mr.
20 Frackman, as the court may know, is a super lawyer, new to the
21 case, OneWest was on the horns a dilemma in June of 2010. It
22 faced --

23 THE COURT: You have lawyers. As you just said, they
24 have very good lawyers. They can construe the documents as
25 well and decide what they're going to do. Go ahead.

1 MR. WARE: One piece of background.

2 In the early years of the foreclosure crisis,
3 servicers would sometimes cite investor refusal or investor
4 permissions as a ground on which to refuse modifications, and
5 some studies indicated that this wasn't always true, and there
6 are additionally stories, very epigrammatical stories by
7 drilling down, by foreclosure defense counsel and advocates in
8 state courts in finding it really wasn't true. There is a
9 skepticism in the foreclosure courts when the servicer says I
10 can't help you, my hands are tied by the investors.

11 Certainly that was the case with Justice Spinner in
12 Suffolk County and now in many courts. For example, in Nevada
13 there is a court rule that is a nonjudicial foreclosure
14 statement. The court rules you have to show up with this power
15 to modify the loan even if the servicer doesn't actually have
16 the authority to do that.

17 There was some skepticism and threats of sanctions on
18 that one side. On the other side, OneWest didn't want to do --
19 they know the documents are problematic and they didn't want to
20 do it in the face of those bad documents.

21 THE COURT: Don't you have 25 percent or more of the
22 certificate holders authorizing you to make the modifications,
23 and that is all you need under the documentation in all but two
24 of the trusts?

25 MR. WARE: Your Honor, probably not. It is not the

1 best set of securitization papers ever done.

2 25 percent, we feel, is more than enough to direct the
3 trustee to take a position in the lawsuit. It may not be
4 enough to remove from the servicing agreement a provision
5 that's effective. This is something that caused consternation
6 on the HSBC side.

7 In many documents it will be quite clear, there will
8 be different thresholds for different types of actions by the
9 trustee, and with 25 percent being the most common allows most
10 forms of operation and certain modifications to the documents
11 requiring higher threshold. It is unclear in these it isn't a
12 hundred percent for the trustee to directly do what I think
13 everybody, just about everybody would like to see done, which
14 is to see the servicing agreement reformed to excise the
15 restriction on OneWest.

16 The court asked whether all the interested parties
17 were among those whom the court identified, and the answer is
18 yes. So we have borrowers, the servicer, the trustee and the
19 certificate holders. At the beginning --

20 THE COURT: And everybody -- again I am using the 25
21 percent figure. If I am wrong, tell me. Using the 25 percent
22 figure, everybody except arguably the two trusts, in essence,
23 is saying let's allow the modifications under HAMP as long as
24 there is, I think, a positive net value, if I remember.
25 Everybody is asking that that be done?

1 MR. WARE: That's the net economic effect of what the
2 certificate holders have directed, the actual directions are
3 facing the litigation as opposed to the servicing agreement
4 itself.

5 We are comfortable that being directed to take this
6 position in the litigation and encouraging a certificate holder
7 who thought we were acting in derogation of his rights to speak
8 up.

9 THE COURT: And nobody has filed anything at least on
10 the ECF system here in court. The chambers has received
11 nothing.

12 MR. WARE: We have received nothing. We have a very
13 wide-open channel to the investors and we have made available
14 executives to talk to them and answer their e-mail inquiries,
15 and no one has told us not to let this go forward.

16 THE COURT: So where is the controversy?

17 MR. WARE: The controversy was quite real in June of
18 2010 because at that time OneWest thought that the documents
19 gave it certain rights, and the counterparty was refusing, and
20 OneWest faced the prospect of liability and if it couldn't get
21 that problem resolved.

22 Over time some of the sting has come out of the
23 controversy in the sense that HSBC is no longer opposing as a
24 practical matter the HAMP modifications. I should emphasize
25 that HSBC is pro-modification and in our own portfolio has done

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1 hundreds of thousands, but here our situation is a little
2 different. We have these documents.

3 A judgment, whether it is reformation of the contract
4 or declaratory judgment or injunction, that has the effect of
5 excising the restriction on modification from the servicing
6 agreement is clearly something that its trustee feels it has
7 been directed to let happen or to procure, and that doesn't
8 have the 100 percent threshold that is arguably present for us
9 directly to modify that agreement with the servicer.

10 So there is a controversy in the sense that in the
11 declaratory judgment sense that people on both sides of the
12 aisle in this case fear litigation from different vectors
13 unless these documents can be given a definitive construction
14 on which there is certainly grounds for controversy. I think
15 that's the thrust of declaratory judgment controversy in the
16 2201 sense.

17 THE COURT: The stretch? I think the main thing here
18 is, as near as I can tell, all the actors are interested in the
19 modifications being permitted consistent with the parameters of
20 HAMP. Certainly the policy issue supports the modifications in
21 terms of there being I think a specific part of the statute
22 that says its relief for the homeowners, that is the purpose
23 behind the statute here.

24 But let's turn to the specific documents. Let me tell
25 you how I see it in an overview and then just tell me if you

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1 agree with the overview. The MMLPSA is the document that
2 governs all of the trusts. That defines OneWest as the loan
3 servicer's obligations. Section 11.01 says that, in essence,
4 OneWest shall not permit any modifications with respect to any
5 mortgage loan that would change the mortgage interest rate,
6 defer or forgive the payment thereof or of any principal or
7 interest payments, and then it goes on.

8 So that, it seems to me, is the main documentary
9 stumbling block here to the MMLPSA, that OneWest shall not
10 permit any modifications with respect to mortgage loans, to
11 change the interest rate, deferral or forgive payment thereof.

12 OneWest, can you sign onto this statement I just made?

13 MR. FRACKMAN: Yes, that is the problematical
14 document.

15 THE COURT: HSBC?

16 MR. WARE: Yes, your Honor.

17 THE COURT: I want to see what the areas of agreement
18 here are. Obviously, the modifications one would assume very
19 definitely involve changing of the interest rate, deferring or
20 forgiving payment of principal. That is the key document here,
21 the 2005 document.

22 Then we have later documents, I think it is relevant
23 they're later and I think OneWest makes that point, we have the
24 pooling and servicing agreement which sets up each trust and
25 states that the loan shall be serviced consistent with, "those

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1 customary mortgaging servicing practices of prudent mortgage
2 servicing institutions."

3 And then there are some scattered references to
4 modification, but nothing really helps either side here. I
5 think the main point here is the language I've quoted at least
6 insofar as the PSA is concerned. The loans are going to be
7 serviced consistent with those customary mortgage servicing
8 practices of prudent mortgage servicing institutions.

9 OneWest, do you agree with that?

10 MR. FRACKMAN: Yes, your Honor.

11 THE COURT: HSBC?

12 MR. WARE: Yes, your Honor.

13 THE COURT: Okay. The third document, AARA,
14 assignment, assumption and recognition agreement. I think that
15 drops out of the analysis. It simply allows Deutsche Alt-1
16 Securities Mortgage Loan Trust to step into the shoes of DB
17 Structured Products. So I don't think that is central to the
18 analysis.

19 Then we have the fourth document which is the
20 prospectus supplement filed with the SEC, and that is the best
21 argument for this declaratory judgment being granted. It says
22 if the mortgage loan is in default, and it's in the best
23 interests of the certificate holders -- and it is in the best
24 interests of the certificate holders, the servicer -- that is
25 OneWest -- will permit servicing modifications of the mortgage

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1 loan rather than proceeding with foreclosure subject to certain
2 limitations.

3 OneWest, are you on board with that analysis also?
4 That is your strongest straw?

5 MR. FRACKMAN: Yes, your Honor, it is.

6 THE COURT: HSBC?

7 MR. WARE: It is its stronges straw.

8 THE COURT: Yours, too. You don't oppose the motion.

9 How, how do you make the leap from ERISA law to having
10 any binding effect of the prospectus supplement, and by that I
11 mean as follows:

12 I agree with your statement that the SPD, summary plan
13 description, can sometimes trump the plan documents under ERISA
14 because the plan participants have all received the summary
15 plan document, and if any of you are participating in those
16 things, that is what you read, by and large. So that makes
17 sense to say if there are certain terms in the SPD that are
18 inconsistent with the plan documents themselves, under certain
19 documents the SPD controls.

20 It seems to me -- and you argue, both of you, that so,
21 too -- here the prospectus supplement was filed with the SEC,
22 not given to all the certificate holders, but filed with the
23 SEC, and it permits the modifications. I'll state this more
24 strongly than I believe it, just to make the point.

25 Why in the world should I use ERISA law in this

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1 context when this is governed by New York law? Do you both
2 agree on that as well?

3 I just don't know what the connection is between ERISA
4 law and the contract law. Sir?

5 MR. FRACKMAN: I think the best argument is that given
6 the absence of any perfect analogue elsewhere --

7 THE COURT: In other words, you can't find any law in
8 support?

9 MR. FRACKMAN: Right, or against it, I mean one way or
10 the other.

11 Where you have a tension between outward-looking
12 documents, in this case the prospectus supplement that goes to
13 the parties that are really the arguably ones in interest, the
14 investors, and this earlier document --

15 THE COURT: Does the prospectus supplement go to the
16 certificate holders?

17 MR. FRACKMAN: I don't know whether it is the
18 certificate holders.

19 THE COURT: I thought it was simply filed with the
20 SEC?

21 MR. WARE: It is supposed to go to the initial
22 purchasers, your Honor.

23 THE COURT: All right.

24 MR. FRACKMAN: They get this document that clearly
25 anticipates modifications or the possibility of modifications,

1 and you have an earlier document that would seem to be
2 inconsistent with what we put into a public SEC filing. This
3 is the closest analogous we could come up with.

4 I recognize it is not perfect, but we're trying to
5 come up with a way to get to the right result here that doesn't
6 trespass on any of the parties' interests.

7 THE COURT: That is exactly what I am trying to do. I
8 want to get to a result that permits the homeowners to have
9 modifications consistent with HAMP because that is what the
10 statute is, and I think I can obviously take notice of the
11 financial crisis that the country has been involved in in terms
12 of home ownership. I certainly don't want to do that at the
13 cost of overriding clear contractual language.

14 MR. FRACKMAN: Understood. Here we have what I would
15 say is a pretty gross distinction between that original
16 document and all the documents that follow, including the
17 documents by which the subsequent entities step into the shoes
18 of DB Structured Products, which was the counterparty on that
19 original document.

20 Your Honor, you didn't seem to think the AARA was
21 particularly relevant, but that is the document by which
22 Deutsche Alt-A stepped into the shoes of --

23 THE COURT: And that --

24 MR. FRACKMAN: And that document also anticipated
25 modifications.

1 THE COURT: Show me that then. Show me.

2 MR. FRACKMAN: If you have your binder --

3 THE COURT: Let me just go to my Deutsche Alt-A, if I
4 can find it because, as I say, it is jammed up. We may end up
5 in the same place.

6 Give me your cite.

7 MR. FRACKMAN: If you go to the binder I handed up, it
8 is the page stamped D-274. The assignment assumption and
9 recognition agreement begins on page D-260. With that document
10 are some forms, some exhibits, one of which is Exhibit 2,
11 entitled, "Standard file codes delinquency reporting."

12 And on D-274, you see there is a field for a loan
13 modification at the bottom of the page. Then --

14 THE COURT: So that tells you --

15 MR. FRACKMAN: That the parties anticipated the
16 possibility that there might be loan modifications. Then if
17 you go to the page numbered D-279, which includes something
18 called Exhibit 2, the standard file codes delinquency
19 reporting, too, but it is a different part of this document.
20 You see again the loan modification reference.

21 THE COURT: Yes.

22 MR. FRACKMAN: So if there had been no possibility of
23 loan modifications, then our argument is it wouldn't be
24 contained in here as a possible field for reporting purposes.

25 It shows that even Deutsche Alt-A, when they stepped

1 into the shoes of DB Structured Products, I don't want to
2 overstate it, but they knew -- this isn't a state of mind
3 matter, but it is reasonable for them to have anticipated that
4 there was some possibility of modifications of the underlying
5 mortgages notwithstanding what was in the MMLPSA documents to
6 begin with. That is why I think the AARA has some relevance,
7 though not the power of the SEC filing in supplemental
8 prospectus.

9 THE COURT: That is a fair point. Is there anything
10 else you wanted to tell me, Mr. Frackman?

11 MR. FRACKMAN: No, your Honor. I think that this is,
12 I do think there is a case in controversy here. I understand
13 it is not the most perfect of cases, but there is no question
14 that absent some resolution of this conflict between the
15 documents, OneWest is faced with potential exposure liability
16 risk any time it wants to do what HAMP requires us or
17 encourages us to do, which is modify the underlying mortgages,
18 which we want to do.

19 THE COURT: It clearly encourages that. I think it
20 also says if it can't be done because of loan documentation, it
21 can't be done, but the overriding policy interest is in
22 modification as set forth in that statute as I read it.

23 MR. FRACKMAN: Correct, and putting us at risk of this
24 exposure every time we want to act correctly under HAMP creates
25 a controversy. Unless HSBC accedes and agrees that we can do

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1 this, we have a disagreement over what the documents mean and
2 permit, that is a contract dispute.

3 THE COURT: Thank you. HSBC, what do you want to tell
4 me that you haven't already, if anything?

5 MR. WARE: The gross-up or prospectus supplement -- I
6 have been doing these bonds so long, I am starting to use the
7 lingo.

8 THE COURT: Bond lawyers are a different breed.

9 MR. WARE: The prospectus supplement is the
10 investor-facing document. I don't think it has exactly the
11 significance, that it has significance for exactly the reasons
12 Mr. Frackman said because OneWest isn't a party to that.

13 This is the same reason I don't think that the ERISA
14 cases are relevant because in the ERISA, the summary plan
15 document is issued by the plan sponsor, and if it is more
16 generous than the actual documents, it is fair to charge them
17 with that. Here OneWest isn't in those intermediate documents.
18 The certificate holders for which the trustee acts bought bonds
19 on the basis of a gross-up that said we would have reasonable
20 and customary.

21 They didn't know necessarily about the servicing
22 agreement, the standing agreement under which OneWest Bank's
23 predecessor had sold bonds into this securitization machinery
24 at Deutsche. To me, the bright answer is to reform the
25 servicing agreement.

1 THE COURT: All you need is a declaration of rights.
2 You don't need the injunction of --

3 MR. WARE: A declaration is fine, but probably more
4 precisely right is the equitable relief of reforming the
5 servicing agreement. We would certainly be happy to work with
6 the plaintiff's lawyers to draw up a decree like that if it
7 suits the court's purposes.

8 THE COURT: You don't need, I repeat, you don't need
9 the injunctive language as long as you have the declaratory
10 language.

11 MR. WARE: That's right.

12 THE COURT: All right. I would like to resolve this,
13 so I want to step off the Bench. Can you come back at 4:00,
14 all right? Everybody can be here at 4:00. Come back at 4:00
15 o'clock. If I can have something for you, I will have
16 something for you.

17 (Recess)

18 (In open court)

19 THE COURT: Please be seated, counsel. My decision is
20 as follows:

21 This is a declaratory judgment action brought under 28
22 U.S.C. 2201, by OneWest Bank FSB, as loan servicer against HSBC
23 Bank USA National Association, as trustee of the Deutsche Alt-A
24 Securities Mortgage Loan Trust. The amended complaint added a
25 variety of different series, so there are 10 trusts altogether.

1 It was originally one trust, if I recall correctly.

2 OneWest seeks a declaration that, "the statutory safe
3 harbor of 15 U.S.C. 1639 A.b, which is the Helping Families
4 Save Their Homes Act of 2009, applies to any HAMP modifications
5 OneWest Bank makes with respect to HAMP-eligible loans held by
6 the trusts, that there is no liability based solely upon the
7 implementation by OneWest Bank of a HAMP modification of a
8 trust owned loan.

9 The statutory safe harbor that the loan servicer seeks
10 states, "A servicer that is deemed to be acting in the best
11 interests of all investors or other parties under this section
12 shall not be liable to any party who is owed a duty under
13 Subsection (a)(1), and shall not be subject to any injunction,
14 stay or other equitable relief to such party based solely upon
15 the implementation by the servicer of a qualified loss
16 mitigation plan." 15 U.S.C. 1639 A.b.

17 I have determined that this is a case of actual
18 controversy pursuant to 28 U.S.C. 2201 and have accepted
19 jurisdiction over this declaratory judgment action, and the
20 parties know declaratory judgment actions are always
21 discretionary in the sense the court does not have to accept a
22 declaratory judgment action. Given the public policy at
23 interest here and the existence of a variety of parties, I have
24 accepted jurisdiction.

25 The relevant documents which we discussed during the

1 oral argument earlier today are as follows:

2 First is the MMLPSA which governs all of the relevant
3 trusts in this action. Section 11.01 of Exhibit 8 to the
4 MMLPSA provides that the loan servicer "shall not permit any
5 modification with respect to any mortgage loan that would
6 change the mortgage interest rate, defer or forgive the payment
7 thereof or of any principal or interest payments, reduce the
8 outstanding principal amount (except for actual payments of
9 principal), make additional advances of additional principal or
10 extend the final maturity date on such mortgage loan."

11 In these papers it is found in Exhibit A to the
12 declaration of Aaron Wade, dated December 6, 2010. That is the
13 first document. As you see, it is the first document in time.
14 As you see, it says that the loan servicer shall not permit any
15 modification with respect to a mortgage loan that changes the
16 mortgage interest rate.

17 The second document is the PSA. The PSAs create the
18 various trusts and they state that the loan shall be serviced
19 in a manner consistent with, "those customary mortgage
20 servicing practices of prudent mortgage servicing
21 institutions." So the second document certainly squints in the
22 direction of permitting modifications because it says, in
23 mandatory fashion, that the loans are going to be serviced in a
24 manner consistent with customary mortgage servicing practices
25 of prudent mortgage servicing institutions. Part of my job is

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1 to see how those are defined.

2 The third document is the AARAs, and those, in effect,
3 substituted Deutsche Alt-A securities mortgage loan trusts to
4 step into the shoes of DB Structured Products. The AARAs do
5 reference loan modifications, and as the attorney for OneWest
6 pointed out earlier, the reference certainly suggests that
7 modifications are permissible.

8 The forms have words "modification for the loan," in a
9 section entitled, "Form of Monthly Servicer's Report," which
10 again suggests that the servicer can modify the loan, and it
11 also has the words, "loan modification" in a separate section
12 entitled, "Standard File Codes-Delinquency Report."

13 So again the first document, the MMLPSA says no loan
14 modifications. The second and third documents, the PSAs and
15 the AARAs certainly suggest that it is possible, especially if
16 we can determine what the customary mortgage servicing
17 practices of mortgage servicing institutions are.

18 The fourth document is the document that is the
19 strongest in favor of OneWest Bank and in favor of HSBC Bank
20 because HSBC Bank does not oppose the motion. It specifically
21 states that both on the first page of its response to the
22 motion. It did not file an opposition. It filed a response.
23 Indeed, the attorney for HSBC Bank here today said once again
24 that HSBC does not oppose the motion.

25 The fourth document, I say, is the prospectus

1 supplement. I am informed that in bond-speak, it is called the
2 "pros sup," and that the specific one for the 2006 AR5 trust
3 provides that, "In instances in which a mortgage loan is in
4 default or if default is reasonably foreseeable, and if
5 determined by the servicer to be in the best interests of the
6 certificate holders, the servicer may permit servicing
7 modifications of the mortgage loan rather than proceeding with
8 foreclosure. The servicer's ability to perform servicing
9 modification is subject to certain limitations in the pros
10 sup," and I've quoted from a pros sup for the 2006 AR5 trust.

11 The prospectus supplements for the other trusts
12 contains substantially similar language or actually language
13 that is even more expansive in permitting modifications than
14 that contained in the prospectus supplement for 2006 AR5 trust.

15 So there you have the four sets of documents. Again
16 the very first one in time does not permit modifications. The
17 next two suggest that they're certainly possible. The fourth
18 one certainly permits service modifications rather than
19 proceeding with foreclosure and if determined by OneWest to be
20 in the best interests of the certificate holder.

21 How do the parties line up here?

22 Not only do the parties to this litigation, OneWest
23 Bank and HSBC Bank as trustee, urge on the court the relief
24 sought, but all the relevant stakeholders here seem to consent
25 to the relief, or at a minimum have not voiced opposition.

1 The loan servicer, OneWest Bank, seeks it. The
2 trustee, HSBC Bank, does not oppose it. The homeowners at
3 interest, to the extent the court and the parties can
4 determine, certainly seek it because it is the homeowners
5 seeking loan modifications based on the HAMP program that are
6 really behind this litigation because it is they that were
7 seeking modifications. OneWest Bank felt obligated to seek a
8 declaratory judgment rather than face potential liability by
9 modifying the loans pursuant to HAMP. So all those parties are
10 seeking the relief sought.

11 What about the certificate holders here, because HSBC
12 is the trustee for the loan trust and the certificate holders,
13 the owners of these loans? The owners were surveyed by HSBC,
14 and in each trust, all of the trusts -- I take it that is
15 approximately 80 -- had more than 25 percent of the certificate
16 holders indicate that they either approved the ability of
17 OneWest to modify the loans or didn't oppose it. In at least
18 some of the trusts, the 25-percent level gives HSBC Bank the
19 go-ahead with the modifications or at least permit OneWest Bank
20 to do so.

21 So there appears that there is a significant majority
22 of the certificate holders who either want this modification or
23 want this declaratory judgment or don't oppose it, and of
24 importance to the court is that HSBC indicated to any of the
25 certificate holders they have the ability to contact the court

1 directly to make their views known, and there is no filing of
2 any certificate holder on the court's electronic case filing
3 system, and my chambers have not received any notification that
4 I am aware of, either, from any of the certificate holders.

5 So it appears that all of the relevant actors here
6 want there to be loan modifications or at least the ability of
7 OneWest Bank to modify the loans consistent with the HAMP
8 program. I have Rule 56.1 statements by each of the parties,
9 and they essentially are in agreement. There is really no
10 dispute of fact here.

11 The parties are also in agreement that New York law
12 controls; and, therefore, because there is no extrinsic
13 evidence that either of the parties point me to, this presents
14 a question of law for the court and can be determined on
15 OneWest's motion for summary judgment.

16 See Hartford Accident & Indemnity Co. v. Wesolowski,
17 33 NY 2d. 169-172 (1973); accord Compagnie Financiere de CIC,
18 et de L'Union Europeenne v. Merrill Lynch Pierce Fenner &
19 Smith, Inc., 232 F.3d 153, 158 (2d Cir. 2000) in addition to
20 the four sets of documents, and I repeat the latter three in
21 time all permit modifications, and certainly the last one in
22 time, the prospectus supplements explicitly permit
23 modification.

24 In addition to the documents themselves, I do note
25 that federal policy strongly and explicitly currently

1 encourages mortgage servicers such as plaintiff to take all
2 steps reasonably possible to assist distressed homeowners under
3 HAMP as long as the loan documents permit modifications, and
4 that is what we're dealing with.

5 As I said, the PSAs require or permit the loans to be
6 serviced in a manner consistent with, "those customary mortgage
7 servicing practices of prudent mortgage servicing
8 institutions." It is clear, and it is important to the court
9 in this context, that loan modifications implemented pursuant
10 to HAMP constitute a customary mortgage practice.

11 Specifically, Section 129 of the Helping Families Save
12 Their Homes Act of 2009 provides that qualified loss mitigation
13 plan guidelines issued by the Secretary of the Treasury under
14 the Emergency Economic Stabilization Act of 2008, "shall
15 constitute standard industry practice for the purposes of all
16 federal and state laws." That is 15 U.S.C. 1639 A.b.

17 So that handles the connection between the PSA and the
18 ability to modify the loans because the Helping Families Save
19 Their Homes Act of 2009 states that that is the standard
20 industry practice is, indeed, implementing loan modifications
21 pursuant to HAMP, which is what this lawsuit is all about.

22 Given all of those factors, therefor, it is my
23 determination that the motion for summary judgment by OneWest
24 is granted, and the determination, the declaration is that
25 given the documents themselves, the agreement of the parties to

1 this litigation and essentially all other stakeholders, that
2 loan modifications are desirable as well as the strong current
3 federal policy in favor of loan modifications, I conclude that
4 the statutory safe harbor of 15 U.S.C. 1639 A.b applies to the
5 HAMP modification OneWest as loan servicer makes with respect
6 to any HAMP-eligible loans held by the relevant trusts.

7 I am assuming that the modification will result in a
8 positive net present value of the loan to the owner of the
9 loan, but I believe, indeed, that is a prerequisite of any HAMP
10 modification. Am I correct, gentlemen?

11 MR. FRACKMAN: That is my understanding, your Honor.

12 MR. WARE: Yes, your Honor.

13 THE COURT: That is my determination.

14 I will enter a minute order saying for reasons entered
15 on the record today, the motion for summary judgment is
16 granted, and it is the court's determination that -- and I will
17 restate the paragraph that has the declaration I just read into
18 the record. Thank you very much. I appreciate it.

19 (Court adjourned)
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